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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED C. BERGH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on November 8, 1955.

OPINION BELOW

The opinion of the Court of Claims (R. 45–50; Appendix, *infra,* pp. 1–6) is reported at 132 F. Supp. 462.

JURISDICTION

The judgment of the Court of Claims was entered on November 8, 1955 (R. 71, Appendix, *infra,* p. 27). On October 7, 1955, by order of the Chief Justice (Appendix, *infra,* p. 28), the time for filing a petition for a writ of certiorari was

extended to and including December 9, 1955.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether Federal per diem employees who worked, and were duly paid for such work, on holidays designated for all Federal employees as regular work days during the war period are entitled to an extra day's pay for each of the holidays worked.

STATUTES INVOLVED

1. The Joint Resolution of June 29, 1938 (52 Stat. 1246, 5 U. S. C. 86a) provides:

> * * * whenever regular employees of the Federal Government whose compensation

[1] The opinion of the Court of Claims, entered on July 12, 1955, concludes with the statement "Judgment will be suspended pending a report from the General Accounting Office as to the exact amount due each plaintiff." (R. 50; Appendix, *infra*, p. 6.) In view of this wording, it is our view that time within which to petition for certiorari should not be computed from the date of the interim order but is to be measured by the date of entry of final judgment. See Memorandum For the United States in Response to Brief in Opposition filed in *United States of America* v. *Paul Tanner*, No. 280, this Term, pp. 3–10. However, since certiorari was denied in *Tanner* (on October 10, 1955) without indication as to whether that petition, filed within 90 days of the entry of judgment after accounting, was timely, petitioner, as a precautionary matter, is filing this petition within the proper time, as extended, from the date of the opinion below as well as within time from the date of final judgment.

is fixed at a rate per day, per hour, or on a piece-work basis are relieved or prevented from working solely because of the occurrence of a holiday such as New Year's Day, Washington's Birthday, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, Christmas Day, or any other day declared a holiday by Federal statute or Executive order, or any day on which the departments and establishments of the Government are closed by Executive order, they shall receive the same pay for such days as for other days on which an ordinary day's work is performed.

SEC. 2. The joint resolution of January 6, 1885 (U. S. C., title 5, sec. 86), and all other laws inconsistent or in conflict with the provisions of this Act are hereby repealed to the extent of such inconsistency or conflict.

2. The Joint Resolution of January 6, 1885 (23 Stat. 516), provided:

* * * the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The first day of January, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and such days as may be designated by the President as days for national thanks-

giving, and shall receive the same pay as on other days.

STATEMENT

Respondents, formerly per diem employees of the Navy Department, brought suit in the Court of Claims to obtain an extra day's pay for each legal holiday on which they worked during the year 1945. Since each claim was based on similar facts and raised identical questions of law, the claim of respondent Bergh was selected as controlling, and the relevant facts, set forth below, were stipulated (R. 13).

On May 12, 1943, the President of the United States issued a Directive to the Heads of all Executive Departments and Agencies, which stated: "The necessity for maintaining maximum output in Government activities throughout the war period requires that days normally observed by the departments and agencies as holidays should, with the exception of Christmas, be considered as regular work days for the duration of the war" (R. 27–28). On December 17, 1943, this Directive was reaffirmed in a statement which said (R. 63):

* * * * *

> This policy is consistent with the attitude of the Government toward maintenance of full production in war industry on Holidays other than Christmas.
>
> The President has reaffirmed his desire previously expressed on this matter.

> There is full realization of the long hours which Federal employees are continuously working in the interest of the war effort and of the fact that holiday work is performed by Federal employees without additional compensation. The policy with respect to work on holidays will be reconsidered at the earliest possible moment that progress in the war will permit.
>
> Christmas Day and Christmas Eve have traditionally been important family days in the life of this Nation. The President has indicated that the heads of departments and agencies may, in their discretion, permit offices or establishments to be closed or any employees whose services can be spared to leave their work not earlier than two hours in advance of the usual closing time on Christmas Eve, December 24.
>
> With respect to forthcoming holidays, other than Christmas, you are advised that the President expects them to be observed as regular working days.

In accordance with this Directive, the Secretary of the Navy, on August 17, 1943, issued a directive requiring all employees of his Department to report for work on all holidays except Christmas for the duration of the war (R. 27). Pursuant to the Navy directive, Bergh, a per diem civilian employee of the Navy Department employed as a welder, was required to work on New Year's Day (January 1, 1945), Washing-

ton's Birthday (February 22, 1945), Memorial Day (May 30, 1945), and the Fourth of July (July 4, 1945). For each of these days, all of which are, in peacetime, legal holidays, Bergh was paid at his regular rate of pay. (R. 14.)

On March 10, 1952, Bergh submitted a claim to the Comptroller General of the United States requesting that he be allowed additional compensation equal to an extra day's pay for each day's work performed by him on the holidays listed above (R. 15). This claim was disallowed by the Comptroller General on March 28, 1952 (R. 15). Bergh then brought suit in the court below, seeking recovery of pay equal to the pay which he received on the listed holidays (R. 1–5).

The Court of Claims held that the 1938 Resolution (*supra,* pp. 2–3), which authorizes payment of holiday gratuity pay for those holidays on which an employee is prevented from working, did not "eliminate the customary practice of granting gratuity pay for days worked on holidays occurring on a regular work day" (R. 45, 49; Appendix, *infra,* p. 5). Judge Whitaker dissented.

REASONS FOR GRANTING THE WRIT

The Court of Claims has held that Government per diem employees are entitled to twice their regular rate of pay for holiday work performed by them during World War II when, pursuant to Presidential orders issued to achieve maximum wartime output, holidays generally were not ob-

served in the federal service and per annum employees received no additional compensation for working. The court below reached this conclusion by construing the 1938 Resolution (*supra*, pp. 2–3) so as to allow gratuity pay to per diem employees who did work on such holidays, even though the gratuity benefits of the Resolution are expressly limited to those employees who are *prevented* from working on holidays. We submit that this holding not only ignores the express language of the Resolution, but also disregards its plain purpose and consistent administrative interpretation. The question thus presented is the one left open in *United States* v. *Kelly*, 342 U. S. 193, a question broader in its reach than the contract issue on which that case was decided.[2] Because of the huge number of present and potential claims, the decision below, if allowed to stand, will impose an extremely heavy financial, litigation, and administrative burden upon the Government. In view of the importance of this decision and the substantial doubts as to its correctness, we submit that this Court should grant review.[3]

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[2] In the cases for which this one is a test, there is no wage agreement like the one in *Kelly*, so that the effect of the 1938 Joint Resolution alone must be determined.

[3] Since the case at bar involves the unresolved question presented by the Government's petition for certiorari in the *Kelly* case (No. 209, October Term, 1951), we have here employed much of the material contained in that petition.

1. *The 1938 Resolution does not authorize gratuity pay for holidays on which an employee works and receives his regular pay.*—(a) *The express terms of the Resolution.*—The Resolution states clearly and unambiguously the condition under which holiday gratuity pay is authorized. It provides for such payment only where the employee is "relieved or prevented from working solely because of the occurrence of a holiday." *Supra,* p. 3. If the holiday prevents an employee from working, he gets gratuity pay; if it does not prevent him from working, and he is thus able to earn his regular pay, he is not entitled to an extra day's pay as gratuity pay. Since Bergh was not prevented or relieved from working on the holidays involved here, but, on the contrary, did work and get paid on those days, he is not entitled to gratuity pay.

(b) *The purpose of the Resolution.*—The purpose and background of the 1938 Resolution confirm the need for limiting gratuity pay to those holidays on which an employee does not work. As early as 1885, the preferential treatment then accorded per annum employees with respect to holiday pay was recognized by Congress.[4] Per annum employees

[4] There was earlier congressional recognition of this problem with reference to per diem employees of the Government Printing Office. In 1880, a resolution applicable only to per diem Printing Office employees was passed; its avowed purpose was to compensate those per diem employees who were prevented from working by the occurrence of a holiday for loss of income caused thereby. Joint Resolution of April 16, 1880, 21 Stat. 304.

whose salaries are traditionally regarded as payment for every calendar day in the year (whether work day or non-work day), have always received their regular pay each period, regardless of any holidays on which they are excused from working. Per diem and hourly employees, on the other hand, were not paid for holidays on which they did not work.

An 1885 Resolution eliminated this inequality and prevented holidays from reducing the amount of the regular pay checks for Federal per diem employees. The Resolution allowed specified employees certain designated legal holidays and provided that for all such holidays the employees "shall receive the same pay as on other days." Joint Resolution of January 6, 1885 (23 Stat. 516).

The purpose of this statute was to place per diem employees on a par with per annum employees with regard to holiday pay. But the overbroad language of the Resolution was interpreted so as to accord per diem employees preferential treatment over per annum employees in two major respects: First, per diem employees were allowed a day's gratuity pay even when a holiday on which they did not work fell on Saturday or Sunday (a non-work day) so that they received an extra day's pay in addition to the full week's pay otherwise earned. Second, if they worked on a holiday they received a day's gratuity pay in addition to

their regular rate of pay for that day. 13 Comp. Gen. 295, 297; 18 Comp. Gen. 186, 187. Per annum employees, holding comparable positions, received neither of these benefits.

This situation was brought before Congress in its consideration of H. J. Res. 551, 75th Congress, 3d sess., which became the 1938 Resolution. The sole original purpose of H. J. Res. 551 was to make per diem employees eligible for gratuity pay for certain additional holidays on which they did not work and on which regular employees were excused from work by Executive order. 83 Cong. Rec. 9466.[5] But a letter from the Acting Comptroller General to the Secretary of the Navy, reprinted in the report of the House Committee on the Civil Service, indicates that congressional attention also was drawn to the two preferential benefits accorded per diem employees in interpreting the early resolutions. The letter pointed out that

> * * * even when any of such holidays falls on a nonworkday (such as a Satur-

[5] The Comptroller General had ruled that per diem employees were entitled to holiday pay only for the holidays specified in the existing statutes (*e. g.*, the 1885 Resolution, *supra*, pp. 3–4), and could not receive such pay for additional holidays granted by the President (*e. g.*, December 24, 1937, established by Executive Order 7763 of December 6, 1937). H. J. Res. 551 was thereafter introduced, and provided, in its original form, only for the payment of compensation to employees who did not work on December 24, 1937. H. Rep. No. 2683, 75th Cong., 3d sess., p. 1.

> day), such employees [*i. e.*, per diem employees] receive pay for the holiday when no work is performed thereon, in addition to the full week's pay otherwise earned,

and that per diem employees received

> double compensation for the [holi]day if work is performed thereon. [H. Rep. No. 2683, 75th Cong., 3d sess., p. 5.]

The language of the Resolution as introduced did not eliminate this preferential treatment, but a substitute measure was adopted by the House Civil Service Committee. This substitute measure, enacted as the 1938 Resolution, wiped out both preferential benefits by allowing gratuity pay for a holiday only where the per diem employee was "relieved or prevented from working *solely*[*] because of the occurrence" of the holiday. *Supra*, p. 3. Thus, if the holiday on which the per diem employee did not work fell on a Sunday (a non-work day), he was not to receive any gratuity pay for that holiday because it was not the occurrence of the holiday which made Sunday a non-work day for him. Similarly, if he worked on the holiday, he was entitled to his regular rate of pay but not to any gratuity pay in addition, because the holiday did not prevent him from working. To make certain that preferential benefits would no longer be available to per diem employees, the 1938 Resolution expressly repealed the earlier

[*] Emphasis added.

1885 Resolution under which these benefits had been allowed by administrative interpretation. 52 Stat. 1247. By eliminating these preferential benefits, the 1938 Resolution carried out the intent of the 1885 Resolution in that it made plain that per diem employees were entitled to gratuity pay only when they did not work on a holiday.

(c) *Consistent administrative construction.*—The Comptroller General has consistently ruled that under the 1938 Resolution gratuity pay may not be permitted for those holidays on which an employee actually works. The earliest of these rulings was handed down within a few weeks after the 1938 Resolution took effect. 18 Comp. Gen. 10; 18 Comp. Gen. 186; 18 Comp. Gen. 191; 18 Comp. Gen. 206.[7]

Since that time, the General Accounting Office has consistently adhered to this natural interpretation of the 1938 Resolution. Such a consistent administrative construction is entitled to great

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[7] We respectfully note in this connection that this Court's footnote observation in *United States* v. *Kelly*, 342 U. S. at 196, footnote 6, repeated in the decision below (R. 48)—suggesting that the administrative construction leads to the absurd result of paying an employee less for working than for not working—does not actually accord with the construction employed in practice. Under the Government's view, an employee who works for part of a holiday—a day for which gratuity pay would be paid if he did not work at all—receives a full day's pay consisting of pay for the number of hours worked plus gratuity pay for the balance of the holiday. See 24 Comp. Gen. 843.

weight and "is not to be overturned unless clearly wrong, or unless a different construction is plainly required." *United States* v. *Citizens Loan and Trust Co.*, 316 U. S. 209, 214; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517; *United States* v. *Jackson*, 280 U. S. 183, 193. Certainly, in view of the express language and purpose of the 1938 Resolution, there is at the very least a reasonable basis for the consistent construction accorded the Resolution by the Comptroller General. Since that construction was not clearly wrong, the court below erred in setting it aside.[8]

2. *The wartime policy of nonobservance of holidays supports denial of gratuity pay.*—In normal times there is ample justification for paying an em-

[8] The reason assigned by the court below for its refusal to credit the consistent administrative construction of the Resolution was that to do so "would lead to the conclusion that Congress by the 1938 Resolution intended to put the Government in an unfavorable position competitively at a time when the Government was in need of many new employees for the purpose of national defense." (R. 48; Appendix, *infra*, p. 4.) The error in the Court's reasoning becomes evident when it is recalled that in 1938 Congress found it necessary to appropriate $1,425,000,000 for the Works Progress Administration (52 Stat. 809) and $250,000,000 for Emergency Relief (52 Stat. 83) to alleviate the major national problem of unemployment. The same Congress which enacted the 1938 Resolution also enacted the Fair Labor Standards Act of 1938, 52 Stat. 1060, one of the purposes of which was to induce work-sharing and reduce unemployment by reducing hours of work. *Overnight Transportation Co.* v. *Missel*, 316 U. S. 572, 577. Furthermore, it should be observed that national defense efforts preceding this country's entrance into World War II were not under way in 1938.

ployee bonus or premium pay when he works on a holiday. Holiday work is more onerous and burdensome than work on a regular week day. A holiday is a day for religious, patriotic, or recreational pursuits. Assignment to holiday work involves on the part of the employee a departure from the normal way of living. These considerations justify payment of premium pay to those Federal employees who are required to work when other Federal employees are excused from work and allowed to enjoy an uninterrupted holiday without loss of pay.

The court below, however, completely overlooked the fact that during wartime none of these considerations is pertinent. Perhaps one of the least inconveniences in World War II was that suffered by civilian employees who had to give up their holidays so as to attain the maximum output needed for waging a successful war. The 1943 Presidential Directive, declaring the overriding wartime need, required all civilian Government employees to work on all holidays throughout the war with the exception of Christmas, *supra,* pp. 4–5. The normal peacetime holidays were thus converted into regular work days and employees generally were required to work on those days "without additional compensation" (Presidential Directive, December 17, 1943, *supra,* p. 5).

The policy of allowing gratuity pay for holiday work in peacetime (where such work is unusual) and of prohibiting it in wartime (when

holidays are regular work days) is reflected in the Federal Employees Pay Act of 1945. That Act, which became law after VE Day but before VJ Day, provided that its provision for premium pay for holiday work shall not take effect until "cessation of hostilities in the present war." 59 Stat. 298, Sec. 302, 5 U. S. C. 922. Postponement of the effective date of the premium pay provision was necessary because of the express congressional recognition of the policy that during World War II, "all holidays, except Christmas, are regular workdays." H. Rep. No. 726, 79th Cong., 1st sess., p. 13.[9] Since the holidays involved in the instant litigation were regular wartime work days, it is apparent that the decision below allowing gratuity pay conflicts with the well-established policy allowing such pay only for peacetime holidays. Cf. *DiBenedetto* v. *United States*, 108 C. Cls. 18, certiorari denied, 332 U. S. 763. In its decision, the court below has placed per diem employees in a superior status expresly denied to per annum employees by consistent legislative and administrative policy.

3. *The question, left open in United States* v. *Kelly*, 342 U. S. 193, *is of substantial importance.* The question on which certiorari was granted in the *Kelly* case was whether the 1938 Resolution permitted gratuity pay in addition to pay for

[9] This report accompanied H. R. 3393, which became the Federal Employees Pay Act of 1945.

work on holidays where a wage agreement covering the employees involved provided that, for working on a holiday, the employees should "be paid at the day rate plus 50 per cent for all the time actually employed in addition to their gratuity pay for the holiday as provided by law * * * ." Holding only that the wage agreement required an affirmative answer, this Court stated that the Resolution "was silent on the subject of gratuity pay for holidays on which work was performed, *and we may even assume that it did not provide gratuity pay for those days.*" 342 U. S. at 195 (emphasis added).[10] The Court there held that the problem was "whether the Resolution somehow precludes the awarding of the gratuity pay which the agreement seems to grant." *Id.* at 194. Here, on the other hand, the question is not whether the Resolution *precludes* such pay where an agreement may award it, but whether, in the absence of any agreement, the Resolution *authorizes* such pay. Thus, the *Kelly* case, far from being dispositive of the issue here, helps to demonstrate the propriety of review in this case.

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[10] Chief Justice Vinson and Justices Reed and Black, dissenting, were of the the opinion that the Resolution allows gratuity pay only where a holiday prevents employees from working, and that, therefore, a wage agreement calling for gratuity pay "as provided by law" could not be construed to grant employees such pay where they were not prevented from working by the occurrence of a holiday. 342 U. S. at 197.

For the broader issue undecided in *Kelly* remains one of widespread significance. The General Accounting Office has advised that, as a result of the decision below, upwards of 70,000 claims for extra pay for holidays worked have already been received. While it has not been possible to secure a complete estimate of the number of potential claimants, there is a strong possibility that full liability on the part of the United States would amount to three-quarters of a billion dollars. And it is to be noted in this connection that the statute of limitations for claims before the General Accounting Office is ten years. 31 U. S. C. 71a.[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
SAMUEL D. SLADE,
SONDRA K. SLADE,
Attorneys.

DECEMBER 1955.

[11] A bill (H. R. 7597) has been introduced in the House of Representatives to waive the ten-year statutes of limitations applicable to claims before the General Accounting Office (31 U. S. C. 71a) for the benefit of those former employees who did not timely file their claims.